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THE JURISDICTION OF THE NORTH CAROLINA SUPREME COURT

ATWELL CAMPBELL McINTOSH*

I. Organization. When first established, the court was composed of three justices, appointed by the general assembly to hold office during good behavior; and the justices themselves appointed one of their number as chief justice.¹ By the Constitution of 1868 the number was increased to five, a chief justice and four associate justices, to be elected by popular vote, and to hold office for eight years and until their successors are qualified.² By an amendment in 1875 the number was reduced to three, and in 1887 it was again increased to five, as the court is now constituted.³ The court is thus made by the Constitution a coördinate department of the government and is not subject to legislative control.^{3a}

In case of a vacancy, the power of appointment is vested in the governor to fill such vacancy. The original section of the Constitution provided for filling the vacancy "until the next regular election," and this was construed to mean "the next regular election for that office"; but this was changed by the amendment of 1875 to the next regular election for members of the general assembly.⁴ The question then arose as to whether the justice so elected should hold office for eight years or only for the unexpired term, and it was held that it should be only for the unexpired term.⁵

The court is a court of record, and the clerk of the supreme court, who is appointed by the court for a term of eight years, is required to keep the records of the court in his office in Raleigh.⁶ Other officers appointed by the court are the supreme court reporter, the marshal and the librarian.⁷

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¹ Rev. Stats., ch. 33, ss. 1, 5; Rev. Code, ch. 33, ss. 1, 5.

² Const., Art. 4, ss. 6, 21, 25.

³ Const., Art. 4, s. 21; C. S. 1403, 1404.

^{3a} *Wilson v. Jordan*, 124 N. C. 683, 705, 33 S. E. 139.

⁴ Const., Art. 4, s. 25; *Cloud v. Wilson*, 72 N. C. 155; *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787; *Rodwell v. Rowland*, 137 N. C. 617, 626, 50 S. E. 319.

⁵ *Opinion of Judges*, 114 N. C. 923.

⁶ Const., Art. 4, s. 15; C. S. 1406, 1424.

⁷ C. S. 1423, 1427, 1428.

II. Terms of court. Prior to 1868 the court held three terms a year, two in Raleigh and one in Morganton;⁸ but since that date two terms are held each year, both in Raleigh, commencing on the first Monday in February and the last Monday in August, and continuing until the business on the docket is disposed of by hearing or continuance. If no one of the justices should attend during the first week of the term, the court will stand adjourned until the next term.⁹

III. Quorum. Three justices constitute a quorum for the transaction of business.¹⁰ When only three justices are present, the other two being absent or failing to take part in the hearing for any cause, they may proceed with the business, and the opinion of two, the third dissenting, would be the decision of the court, although less than a majority of the court. In *State v. Lane*,¹¹ when the court was composed of three members, one of the justices died and the other two rendered the decision and ordered the judge of the lower court to carry the judgment into execution. The superior court judge refused to proceed because he was of the opinion that two justices did not constitute the court. On appeal it was held that the two, being a majority of the court, had authority to proceed.

IV. Original jurisdiction. Prior to 1868, the court had original exclusive jurisdiction in repealing letters patent.¹² The present Constitution provides that "the supreme court shall have original jurisdiction to hear claims against the state, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action."¹³

It is an established principle of jurisprudence that the sovereign state cannot be sued without its consent, and it may prescribe the terms and conditions under which such suits may be brought. So far as the state courts are concerned, this provision of the Constitution, with the statutes enacted to carry out its purpose, is the only relaxation of the rule as to exemption from suit.¹⁴

⁸ Rev. Code, ch. 33, s. 2.

⁹ C. S. 1408.

¹⁰ C. S. 1407.

¹¹ 26 N. C. 434. This case is interesting because of the fact that Ruffin, Chief Justice, rendered the opinion of the court, and Pearson, later Chief Justice, was the superior court judge.

¹² Rev. Stats. ch. 33, s. 6; Rev. Code, ch. 33, s. 6.

¹³ Const., Art. 4, s. 9; C. S. 1409.

¹⁴ *Carpenter v. R. R.*, 184 N. C. 400, 114 S. E. 693; *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789; *Martin v. Worth*, 91 N. C. 45; *Battle v. Thompson*, 65

1. Nature of the jurisdiction. The purpose of the jurisdiction is to have the court give an opinion upon an important question of law involved in a particular claim, which may aid the legislature in disposing of it, since it was formerly considered questionable whether the court, in the exercise of its constitutional duties, could communicate an opinion to the legislature.¹⁵ The authority extends only to deciding upon the legal validity of the claim upon the facts presented and reporting that decision as a recommendation. No judgment can be rendered which can be enforced by any process in the nature of an execution. It is intended to give the claimant an opportunity to have the legality of his claim passed upon because, the state being a party, he cannot try the question in the ordinary courts.¹⁶ The jurisdiction thus conferred is exclusive, and cannot be exercised by any other court, nor by the supreme court on appeal from a lower court.¹⁷

2. Nature of the claims. The terms used, "claims against the state," and "any person having any claim against the state,"¹⁸ would seem to embrace claims of every kind, but this meaning has been much restricted by the construction of the court.

a. Law and fact. The jurisdiction is limited to questions of law arising upon the facts presented, and does not extend to cases where only questions of fact are involved. Where the claimant demanded pay for services rendered as a judge of the superior court, it was admitted that the service had been performed, but it was denied that he was entitled to compensation as a judge, the court decided that the claim was valid and recommended payment.¹⁹ So where the claim for services rendered to the state under a contract which the state alleged to be invalid or to have been rescinded, the facts having been admitted or ascertained, the court determined the legal validity of the claim and recommended payment.²⁰

N. C. 406. As a member of the Federal Union the state may be sued in the manner authorized by the Const. of U. S., Art. 3, s. 2, and Art. 11. See *South Dakota v. North Carolina*, 192 U. S. 286.

¹⁵ *Reynolds v. State*, 64 N. C. 460.

¹⁶ *Bain v. State*, 86 N. C. 49; *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789; *Dredging Co. v. State*, 191 N. C. 243, 132 S. E. 25.

¹⁷ *Battle v. Thompson*, 65 N. C. 406; *Boner v. Adams*, 65 N. C. 639; *Martin v. Worth*, 91 N. C. 45; *Chemical Co. v. Board of Agriculture*, 111 N. C. 135, 15 S. E. 1032; *Printing Co. v. Hoey*, 124 N. C. 767, 33 S. E. 160; nor can an action be maintained in the district court of the United States, *North Carolina v. Temple*, 134 U. S. 22.

¹⁸ C. S. 1409, 1410.

¹⁹ *Henry v. State*, 68 N. C. 465.

²⁰ *Clements v. State*, 76 N. C. 199; s. c. 77 N. C. 142; *Bledsoe v. State*, 64 N. C. 392.

Where the claims were for services rendered or supplies furnished and the facts were denied, the court declined to investigate the facts and held that the claimant's remedy was by application to the legislature.²¹ Where the claimant demanded the return of \$50. paid as license fee to the state, under a law which had been declared unconstitutional by the supreme court of the United States, the court held that the claim was too small and the question of law too well known to justify an investigation, and that the claimant should apply for relief to the legislature.²²

When a claim against the state is sought to be enforced, the rights of the claimant and the liability of the state may be determined by the same laws as in the case of private persons; and the state may plead the statute of limitations as a bar to the claim.²³ But when an action is brought by the state in the proper court to collect a claim due the state, the defendant is not allowed to set up a counterclaim, unless it is in the nature of a set-off or credit growing out of the original cause. An independent counterclaim is a claim against the state which can be asserted only in the supreme court.²⁴

b. Relief obtainable in another court. This jurisdiction has been conferred because the state is the defendant, and if the claim is one in which the claimant may obtain relief in the regular way in another court the jurisdiction is not exercised. Where the plaintiff sued in the supreme court alleging that he was the owner of certain land held by the Insane Asylum, an agency of the state, and asked the court to investigate the title and to recommend a purchase by the state, it was held that since the Insane Asylum was an agency of the state, authorized to sue and be sued, an action might be brought in the ordinary way in the superior court to try the title. It was further held that the court could not make the recommendation asked for, since it could recommend to the legislature only that which in ordinary cases could be declared by judgment and enforced by execution.²⁵

c. Claims which may not be paid. Only claims which the legislature is authorized to pay by appropriate legislation under the Constitution may be considered, and not those claims the payment of

²¹ *Reynolds v. State*, 64 N. C. 460; *Reeves v. State*, 93 N. C. 257; *Dredging Co. v. State*, 191 N. C. 243, 132 S. E. 25.

²² *Sinclair v. State*, 69 N. C. 47. See also *Cowles v. State*, 115 N. C. 173, 20 S. E. 384; *Miller v. State*, 134 N. C. 270, 46 S. E. 514.

²³ *Cowles v. State*, 115 N. C. 173, 20 S. E. 384.

²⁴ *Battle v. Thompson*, 65 N. C. 406.

²⁵ *Bain v. State*, 86 N. C. 49; *County Bd. of Education v. State Bd. of Education*, 106 N. C. 81, 10 S. E. 1002.

which is prohibited, or which must first be submitted to the popular vote.. This has been held with reference to claims against the state arising out of the Civil War;²⁶ and in regard to certain "special tax bonds" issued during the period of Reconstruction.²⁷

d. Claims arising out of tort. While the state can act only through its recognized agencies, the wrongful acts of such agents do not impose any liability upon the state under the doctrine of *respondet superior*, and such claims cannot be considered. A claim was filed in the supreme court by the plaintiff, alleging that he was a convict in the state prison and was injured by an explosion due to the negligence of the manager in charge, and it was held that no liability on the part of the state existed and the claim was dismissed.²⁸ Similar actions were brought in the superior court against agencies of the state for personal injuries growing out of negligence; it was held that such agencies were not liable to be sued unless expressly authorized, and if such action could be brought there was no liability on the part of the state.²⁹

e. Costs of action as a claim. While the state may be sued only in the supreme court, it may sue in any court having jurisdiction over the cause of action, and the costs of such litigation may be taxed against the state as in case of private litigants. Such costs, however, do not constitute a claim against the state as contemplated in the jurisdiction of the supreme court, but are only incidental to the right to sue. The court in which the action is brought adjudicates the costs, and the parties interested should apply to the legislature for payment.³⁰

3. Procedure. The method of prosecuting claims against the state is regulated by statute. (a) The claimant must file his complaint in the office of the clerk of the supreme court, setting forth the nature of his claim. (b) He shall cause a copy of his complaint to be served upon the governor, at least twenty days before application for relief is made to the court, and he shall request the gov-

²⁶ Const., Art. 1, s. 6; *Rand v. State*, 65 N. C. 194, 6 A. R. 741.

²⁷ Const., Art. 1, s. 6; *Horne v. State*, 82 N. C. 382; s. c. 84 N. C. 362; *Baltzer v. State*, 104 N. C. 265, 10 S. E. 163; s. c. 109 N. C. 187, 13 S. E. 724; *Cowles v. State*, 115 N. C. 173, 20 S. E. 384; *North Carolina v. Temple*, 134 U. S. 22.

²⁸ *Clodfelter v. State*, 86 N. C. 51, 41 A. R. 440.

²⁹ *Moody v. State Prison*, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855; *Car-penter v. R. R. and Highway Comm.*, 184 N. C. 400, 114 S. E. 693.

³⁰ C. S. 1236; *Miller v. State*, 134 N. C. 270, 46 S. E. 514; *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364; *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789; s. c. 120 N. C. 19, 26 S. E. 649.

error to appear for the state and answer the claim. (c) When an appearance is made for the state and pleadings are filed, the trial shall be conducted as the court shall direct. (d) If issues of fact arise upon the pleadings, they are to be transferred to the superior court of some convenient county to be tried by a jury, and the judge of such court shall certify the verdict and the case to the next term of the supreme court. (e) If there is no appearance for the state, the court may make up issues and send them down for trial. (f) Upon the final hearing, the court shall report the facts found and their recommendation thereon to the general assembly.⁸¹

While the court will not consider cases in which only matters of fact are involved, it may be necessary to ascertain the facts upon which the law is to be declared. This may be done by a jury trial, as above provided, or by a reference to the clerk to find the facts, or the court may act upon information before them.⁸²

Upon the decision of the court, the clerk is directed to send a copy of the complaint and other pleadings, with a copy of the findings and the decision of the court, to the governor, to be by him communicated to the general assembly.⁸³

4. Effect of decision. The decision of the court is not a final determination of the claim which may be enforced as a judgment, but is only a recommendation, to be accepted or not in the discretion of the general assembly. No process in the nature of execution can issue for the enforcement of such claims.⁸⁴ No original jurisdiction exists in the supreme court in regard to claims against the state except as above set forth. In a number of cases coming before the court on appeal from the superior court, the question has arisen as to whether the writ of mandamus could be issued to compel the payment of a claim against the state. Where the claim has been ascertained and its payment authorized, and the duty of the officer is purely ministerial, payment may be enforced by mandamus; but where the authority is not clear or the duty involves discretion, the writ will not issue, and the claimant must apply to the legislature.⁸⁵

⁸¹ C. S. 1410.

⁸² *Bledsoe v. State*, 64 N. C. 392; *Clements v. State*, 76 N. C. 199; s. c. 77 N. C. 142; *Horne v. State*, 82 N. C. 382.

⁸³ See cases cited in note 32.

⁸⁴ Const., Art. 4, s. 11; *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364; *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789.

⁸⁵ *Bank v. Worth*, 117 N. C. 146, 23 S. E. 160, 30 L. R. A. 261; *Burton v. Furman*, 115 N. C. 166, 20 S. E. 443; *Co. Bd. of Education v. State Bd. of Education*, 106 N. C. 81, 10 S. E. 1002; *Boner v. Adams*, 65 N. C. 639. Where.

In the case of *White v. Auditor*,³⁶ action was brought in the superior court for a mandamus to compel the auditor of state to issue his warrant for the plaintiff's salary as a state officer, and the case came before the supreme court on appeal. The legislature had passed an act abolishing the plaintiff's office, substituting other officers for the performance of the duties, and providing a method for the payment of salaries. It had been decided that the act depriving the plaintiff of his office was unconstitutional, and that he was still in office. The court decided that since the plaintiff was still in office and it was not the legislative intention to deprive the officer of his salary, it was a proper case for mandamus to issue, issuing the warrant being only a ministerial duty and not involving the exercise of discretion.³⁷

V. Advisory jurisdiction. While the executive, judicial and legislative departments of the government are to be kept separate,³⁸ and each department has its separate field of operation, it has sometimes been considered convenient and of great advantage to have the opinion of the supreme court upon a question of law which might arise either in the executive or legislative departments. In such cases the facts are presented giving rise to the question of law, and the court is requested to give its opinion, not as a judicial determination of the question, but in an advisory capacity. There is no authority to give such advice voluntarily, nor is it an official obligation, but it may be exercised upon request, out of courtesy and respect. The opinion of the court is not a final judicial determination, but it is presumed that if the question should later arise, the court would adhere to its opinion. This advisory power has been exercised in a few cases upon important public questions.³⁹

Where a case comes before the court in such a manner that it cannot proceed to a final determination of the question involved, the

costs had been taxed against the state and the validity of the claim had been ascertained, the remedy of the claimant was to apply to the legislature for payment. *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364.

³⁶ 126 N. C. 570, 36 S. E. 132, growing out of one of the "office holding cases," *White v. Hill*, 125 N. C. 194, 34 S. E. 432.

³⁷ The decision was by a divided court, and impeachment proceedings were instituted against two of the majority justices, the third having died, on the ground that the court had exceeded its authority and had invaded the province of the legislature in regard to claims against the state. The impeachment was not sustained. See *Impeachment Trial*, *Public Documents*, 1901.

³⁸ Const., Art. 1, s. 8.

³⁹ 31 N. C. 516, qualification of voters; 64 N. C. 785, legislative term of office; 120 N. C. 623, the lease of the N. C. R. R.

case will be dismissed; but the court may, if the matter is one of public interest, express an opinion upon the law in question, in the exercise of its advisory power. In a "case agreed" in the superior court, to test the validity of a statute regulating preferences by mortgage, it was held on appeal that the facts stated were not sufficient for the court to render a final judgment, and the case was dismissed; but because it was a question of general public importance the court proceeded to construe the statute.⁴⁰ In an action in the supreme court against the state for breach of contract for public printing, it was held that the action could not be maintained, and the case was dismissed; but the question being one of public interest, the court placed a construction upon the contract without rendering a judgment.⁴¹

VI. Appellate jurisdiction.

1. Statutory period. From its organization in 1818 up to 1868, the jurisdiction of the court was statutory, and its chief function was as a court of review. The statute provides that the court shall have jurisdiction "to hear and determine all questions at law, brought before it by appeal from a superior court of law, and to hear and determine all cases in equity, brought before it by appeal from a court of equity, or removed there by the parties thereto, and in every case the court may render such sentence, judgment and decree, as on inspection of the whole record it shall appear to them ought in law to be rendered thereon."⁴²

Under this statute there were three ways in which a case, which had been brought in the superior court, could be heard in the supreme court. On appeal from a judgment in a case at law, at common law, the ordinary method of reviewing the action of a lower court was by writ of error, based upon the rulings of law in the lower court. Under the statute, such review was called an appeal, and it was heard in the same manner as if a writ of error had been issued, that is, upon exceptions to the ruling of the court upon matters of law.⁴³ In a case tried in the superior court as a court of equity, an appeal was taken to the supreme court, and this carried the whole case up for review upon the law and the evidence, as it had been heard in the lower court. This was in accord with the

⁴⁰ *Farthing v. Carrington*, 116 N. C. 315, 22 S. E. 9.

⁴¹ *Stewart v. State*, 118 N. C. 624, 24 S. E. 114.

⁴² Rev. Stats., ch. 33, s. 6; Rev. Code, ch. 33, sec. 6.

⁴³ *Rush v. Steamboat Co.*, 68 N. C. 72.

regular practice in the English court of chancery. The court of equity was not a jury court, but the judge heard the evidence, which was all in writing, found the facts and rendered the decree thereon. The appellate court, therefore, had the whole case before it, and could review the facts as well as the law.⁴⁴ When a case pending in the superior court as a court of equity was ready for a hearing, it could be removed to the supreme court on motion and sufficient cause shown, and it was there heard and determined as it would have been in the lower court.⁴⁵ By express provision of the statute, the appellate jurisdiction was limited to the review of cases coming from the superior court. An appeal could be taken, as a matter of right, from any final judgment or decree of such court; but it was within the discretion of the superior court to allow an appeal from an interlocutory order.⁴⁶

On appeal from the superior court, the supreme court could render such sentence, judgment and decree as on an inspection of the whole record, it should appear to them ought in law to be rendered; and the consent of the parties could not authorize the court to render any judgment except what ought to have been rendered in the superior court.⁴⁷ On appeal from an interlocutory order or judgment, the court could not render a judgment reversing or modifying the judgment or order appealed from, but certified its opinion to the lower court with instructions to proceed in accordance with such opinion.⁴⁸

2. Constitutional period. Under the Constitution adopted in 1868, it is provided that "the supreme court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference."⁴⁹ The jurisdiction is thus fixed by the fundamental law and is not subject to legislative change.

a. Extent of jurisdiction. The power "to review, upon appeal" has been construed to be the same as that existing under the former law, constituting this a court of error, having all the power which

⁴⁴ *Jones v. Boyd*, 80 N. C. 258; *Long v. Holt*, 68 N. C. 53; *Graham v. Skinner*, 57 N. C. 94.

⁴⁵ Rev. Stats., ch. 32, s. 16; Rev. Code, ch. 32, ss. 20, 21; *Littlejohn v. Williams*, 17 N. C. 380; *Lee v. Norcom*, 16 N. C. 372.

⁴⁶ Rev. Stats., ch. 4, ss. 21, 22, 23; Rev. Code, ch. 4, ss. 21, 22, 23; *McKenzie v. Little*, 31 N. C. 45; *Morrison v. McElrath*, 20 N. C. 612.

⁴⁷ *Rodman v. Davis*, 53 N. C. 134; *Bethea v. McLennon*, 23 N. C. 523.

⁴⁸ Rev. Stats., ch. 33, s. 11; Rev. Code, ch. 33, s. 14.

⁴⁹ Const., Art. 4, s. 8.

a court of error had at common law.⁵⁰ The only way in which the power may be exercised is by appeal from a lower court, or by some proceeding as a substitute for an appeal, in the exercise of supervisory power.⁵¹ What particular questions may give the parties the right of appeal and require the consideration of the appellate court will come more properly under the subject of procedure on appeal. The right to review "decisions of the courts below, upon any matter of law or legal inference" would necessarily include all final judgments and decrees, as under the former statute. The jurisdiction is broader than that, but there must be some *ruling* of the lower court, upon a matter of law or legal inference, before a review may be had.⁵²

While there is no reference in the Constitution to the power of the court to hear an appeal from an interlocutory order, as under the former statute, the words are broad enough to include this, and such has been the legislative and judicial construction. An appeal may be taken from any order or determination of the court, involving a matter of law or legal inference, which affects a substantial right of the parties;⁵³ but not when such orders are within the discretion of the court, unless it appears that such discretion was abused or that the ruling was based upon a matter of law.⁵⁴

b. Law and fact. Under the former practice, when law and equity were administered by the same court but under different systems, the right of review in cases at law was limited to questions of law, while in equity cases both the law and the facts were reviewed. The Constitution provides for a review of matters of law or legal inference, abolishes the distinction between actions at law and suits in equity,⁵⁵ and originally provided that no issues of fact should be tried before the supreme court.⁵⁶ The distinction between law and equity was not abolished, in that the remedies remained as before, but such remedies were to be sought in the same

⁵⁰ *Murrill v. Murrill*, 90 N. C. 120; *Rush v. Steamboat Co.*, 68 N. C. 72.

⁵¹ *State v. Webb*, 155 N. C. 426, 70 S. E. 1064; *James v. R. R.*, 123 N. C. 299, 31 S. E. 707; *Murrill v. Murrill*, 90 N. C. 120; nor can the consent of the parties confer jurisdiction, *Belden v. Snead*, 84 N. C. 243.

⁵² *State v. English*, 164 N. C. 497, 509, 80 S. E. 72; *Tyson v. Tyson*, 100 N. C. 360, 6 S. E. 707; *Sheppard v. Bland*, 87 N. C. 163; *Foushee v. Pattershall*, 67 N. C. 453.

⁵³ C. S. 638, 1413; *Merrill v. Merrill*, 92 N. C. 657.

⁵⁴ *Long v. Gooch*, 86 N. C. 709, and cases cited.

⁵⁵ Const., Art. 4, s. 1.

⁵⁶ Const. of 1868, Art. 4, s. 10.

court and in the same mode of procedure.⁵⁷ The question arose as to whether these provisions limited the appellate jurisdiction of the court to matters of law, as in cases at law under the old practice, and excluded any review of facts in cases which would have formerly been in equity.

In cases of a legal nature it is evident that no change in the practice was intended. The review in such cases is always upon matters of law arising upon the facts found by the lower court, either by the verdict of a jury or by the judge, and there is no power "to review, change, or modify in any respect the findings of fact by the court below."⁵⁸ In cases of an equitable nature the question is more difficult.

In *Heilig v. Stokes*,⁵⁹ the first case in which the question arose, the appeal was from an order of the lower court refusing to vacate a temporary injunction, and it was contended that since the judge below based his ruling upon the facts in issue, it would be necessary to review the facts, and that the appellate court had no power over issues of fact. The court makes the distinction between "issues of fact," or such facts as are put in issue by the pleadings, and "questions of fact," or facts which arise incidentally in the progress of the trial, and holds that the constitutional provision applies only to "issues of fact" in the technical sense. In a later case,⁶⁰ it was held that in "issues of fact" arising upon the pleadings in an equity case, the parties were entitled to a jury trial unless the right was waived. In *Keener v. Finger*,⁶¹ which was an action for an account and settlement by an administrator, the court was asked to review the findings of fact made by the judge below upon exceptions to a referee's report. The court says, "We are of the opinion that the Constitution does not confer such jurisdiction upon this court; on the contrary, we are of the opinion that it is expressly prohibited. . . . The manifest purpose of the Constitution is to take from the supreme court, as constituted under the new system, the jurisdiction which it had under the old order of things to try all equity cases, both law and fact, upon appeal or by transfer from the superior courts."

⁵⁷ *Lumber Co. v. Wallace*, 93 N. C. 22.

⁵⁸ *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801; *Coates v. Wilkes*, 92 N. C. 376; *Burke v. Turner*, 85 N. C. 500; *Greensboro v. Scott*, 84 N. C. 184.

⁵⁹ 63 N. C. 612; see also *Foushee v. Pattershall*, 67 N. C. 453.

⁶⁰ *Armfield v. Brown*, 70 N. C. 27.

⁶¹ 70 N. C. 35, see dissenting opinion of Rodman, J.

Following the decision of *Keener v. Finger*, in 1874, the Constitution was amended in 1875 by striking out the clause, "no issues of fact shall be tried before this court," and substituting the present provision, "the jurisdiction of the court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of 1868."⁶² This amendment was first construed in *Jones v. Boyd*,⁶³ and it was held that the distinction between "issues of fact" and "questions of fact," as made in *Heilig v. Stokes*, is removed and the jurisdiction over both is restored as it existed before 1868. The court does not, in this case, attempt to define the limits of such jurisdiction, and this was done in subsequent cases.

In *Worthy v. Shields*,⁶⁴ the plaintiff brought his action to recover land, and alleged an equitable right to redeem under a mortgage. The defendant denied the plaintiff's allegations, and asked to have the issues of fact submitted to the jury. The judge declined to submit the issues, on the ground that the case was equitable in its nature and that it was the duty of the court to hear and determine the facts, as under the former practice. On appeal it was held that the parties had the right to have the issues of fact in an equity case tried by a jury, and with the same effect as in a case at law. The power of the appellate court to review the facts is limited to matters exclusively of equitable cognizance under the former system; and in such cases only when the evidence is written and documentary, so that the higher court is in the same position as the court below.

In *Coates v. Wilkes*,⁶⁵ the court clearly defines the power of review. "While the legislature has not undertaken to provide how the facts in actions and matters purely equitable in their nature shall be ascertained, otherwise than as in actions where the matter in litigation is purely legal in its nature, it is settled that in equitable matters wherein the evidence is and must be written in the form of affidavits, or depositions, or is documentary, and the court below finds the facts, this court has authority, and it is its duty in a proper case, upon appeal, to consider the evidence before that court, review its findings of fact, and sustain, reverse or modify them. It has uniformly done so since the amendment of the Constitution in 1877,

⁶² Const., Art. 4, s. 8; C. S. 1411.

⁶³ 80 N. C. 258.

⁶⁴ 90 N. C. 192.

⁶⁵ 92 N. C. 376.

in applications for injunctions, receivers and like applications wholly equitable in their nature, wherein questions of fact, as distinguished from issues of fact, have been passed upon by the superior court." It is also held that the court cannot review the evidence and findings of fact in cases purely equitable, where issues of fact are tried by a jury.⁶⁶ The power to review the facts being limited to equity cases, it can not be exercised unless the case is exclusively equitable, and the written evidence is sent up, and not the substance of it.⁶⁷ It has been held not to apply to a partition proceeding, because that is not exclusively equitable;⁶⁸ nor to a proceeding for contempt;⁶⁹ nor in an equity case where the facts have been found by the verdict of a jury.⁷⁰

c. Judgment rendered. It is provided in the statute that "in every case, the court may render such sentence, judgment and decree, as, on inspection of the whole record, it shall appear to them ought in law to be rendered thereon."⁷¹ The appellate jurisdiction in a particular case being derivative and not original, it must appear from the record that the case was properly constituted in the lower court, and what action of the lower court is the subject of review. Where the record fails to show that any court was held, or that any judge was present, or gave any judgment, or what particular matters the court below was called upon to adjudicate, the appellate court cannot proceed to judgment.⁷² It must also appear from the record that the decision of the lower court was in a real controversy between the parties, in which the court had duly considered and decided the questions involved, and not a *pro forma* judgment to which the parties had submitted and then appealed, in order to "feel their

⁶⁶ The limitation thus defined has been consistently followed. *Howard v. Bd. of Education*, 189 N. C. 675, 127 S. E. 704; *Cameron v. Highway Comm.*, 188 N. C. 84, 123 S. E. 465; *Power Co. v. Power Co.*, 171 N. C. 248, 88 S. E. 349; *Harvey v. R. R.*, 153 N. C. 567, 67 S. E. 627; *Travers v. Deaton*, 107 N. C. 500, 12 S. E. 373; *Roberts v. Lewald*, 107 N. C. 305, 12 S. E. 279; *Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257, 19 A. S. R. 530; *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384; *Fortune v. Watkins*, 94 N. C. 304; *Runnion v. Ramsay*, 93 N. C. 410.

⁶⁷ *Gatewood v. Burns*, 99 N. C. 357, 6 S. E. 635.

⁶⁸ *Simmons v. Foscoe*, 81 N. C. 86.

⁶⁹ *Young v. Rollins*, 90 N. C. 125.

⁷⁰ *Wessell v. Rathjohn*, 89 N. C. 377, 45 A. R. 696; *Leggett v. Leggett*, 88 N. C. 108; *Shields v. Whitaker*, 82 N. C. 516.

⁷¹ Rev. Stats., ch. 33, s. 6; Rev. Code, ch. 33, s. 6; C. S. 1412.

⁷² *State v. Preston*, 104 N. C. 733, 10 S. E. 84; *Broadfoot v. McKeithan*, 92 N. C. 561; *Markham v. Hicks*, 90 N. C. 1; *Logan v. Harris*, 90 N. C. 7; *Gordon v. Sanderson*, 83 N. C. 1.

way" in cases of doubtful litigation;⁷³ nor will the court proceed when there is only a fictitious issue or "moot question" presented, upon which it is desired to obtain the opinion of the court.⁷⁴

Since the power of the court to render such judgment as it appears upon the record ought in law to be rendered, was statutory under the former system, and no such power was expressly given in the Constitution, it was contended that the court could only affirm the action of the lower court or, if error was found, remand the case for further action, and could not proceed to render any other judgment. It was held, however, that the same power existed as before; since the appeal, in the nature of a writ of error, gave the court the power not only to reverse a judgment from which a defendant appealed, but also to render judgment for the appellant in a proper case or direct the lower court to do so, where the court below had failed to render a correct judgment.⁷⁵

The power to render judgment is as a court of review, and notice is taken only of such matters as appear upon the record, such as the process, pleadings, verdict and judgment, and the court corrects errors appearing therein and renders such judgment as the lower court should have rendered. Errors not appearing upon the record, as those occurring during the progress of the trial, will not be noticed unless specially called to the attention of the court.⁷⁶ The errors which usually appear upon the record and are to be noticed by the court *ex mero motu* are that the court has no jurisdiction, that the complaint does not state a cause of action, or that the facts found do

⁷³ *Kistler v. R. R.*, 170 N. C. 666, 79 S. E. 676; *Overman v. Lanier*, 156 N. C. 537, 72 S. E. 575; *Bd. of Education v. Kenan*, 112 N. C. 566, 17 S. E. 485; *Hines v. Hines*, 84 N. C. 122; *State v. Locust*; 63 N. C. 574.

⁷⁴ *Burton v. Realty Co.*, 188 N. C. 473, 125 S. E. 3; *Lumber Co. v. Valentine*, 179 N. C. 423, 102 S. E. 774; *Kistler v. R. R.*, 164 N. C. 365, 79 S. E. 676; *Parker v. Bank*, 152 N. C. 253, 67 S. E. 492; *Blake v. Askeu*, 76 N. C. 325.

⁷⁵ *Rush v. Steamboat Co.*, 68 N. C. 72; *Mining Co. v. Mills Co.*, 181 N. C. 361, 106 S. E. 216; *Chavis v. Brown*, 174 N. C. 122, 93 S. E. 471; *Railroad Connection Case*, 137 N. C. 1, 49 S. E. 191, 15 A. S. R. 636; *Bernhardt v. Brown*, 118 N. C. 700, 710, 24 S. E. 527, 36 L. R. A. 402. The statute, C. S. 1412, was in Rev. Stats. and Rev. Code, but was not in the original Code of Civil Procedure nor in Battle's Revisal. It was brought forward in The Code of 1883 and in the Revisal of 1905. The regulation in the Code of Civil Procedure is in C. S. 658.

⁷⁶ *Wyne v. R. R.*, 182 N. C. 253, 109 S. E. 19; *Kimrough v. R. R.*, 182 N. C. 234, 109 S. E. 11; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *Thorn-ton v. Brady*, 100 N. C. 38, 5 S. E. 910; *Duwall v. Rollins*, 71 N. C. 218.

not justify the judgment rendered.⁷⁷ When the appeal is from an interlocutory order, the whole cause does not come before the court, and the decision is certified down to the lower court, to be proceeded with there in accordance with the ruling of the appellate court.⁷⁸

d. Enforcement of judgment. The court has the power to issue execution for the enforcement of its judgments, and may, in its discretion, make such writs returnable before the superior court. In such case the judgment is certified down and the lower court may issue further process necessary to its enforcement.⁷⁹ This was the practice under the former statute, and it was held that an appeal to the supreme court from a final judgment carried the whole case up; the judgment of the appellate court was final, and any execution to enforce it should issue from the supreme court, except for costs in the lower court.⁸⁰ Although the case may be certified down to the superior court, the costs of the supreme court are enforced by execution from that court alone.⁸¹

e. Decision and opinion. The decision of the court is the judgment of the court upon the questions presented and considered; the opinion of the court is the written statement of the reasons upon which the decision is based. There can be but one decision or judgment, while there may be several opinions in the same case.⁸² There is no rule fixed by law determining what number of justices must concur in rendering a decision, so that the general rule of a majority controls.⁸³ Since three of the justices constitute a quorum, the concurrence of two of these, when three are sitting, would be the decision of the court, although it is by less than a majority of the whole court. The decision must be the result of deliberation as a court, and not the opinion of each member separately, although the opinions might be the same. When in the hearing of a case, the

⁷⁷ *Wilson v. Lumber Co.*, 131 N. C. 163, 42 S. E. 565; *Peacock v. Stott*, 104 N. C. 154, 10 S. E. 456; *Norris v. McLam*, 104 N. C. 159, 10 S. E. 140; *Morrison v. Watson*, 95 N. C. 479.

⁷⁸ C. S. 1413, which is the same as under the former practice. Rev. Stats., ch. 33, s. 11; Rev. Code, ch. 33, s. 14; *Perry v. Tupper*, 71 N. C. 380.

⁷⁹ C. S. 1412.

⁸⁰ Rev. Code, ch. 33, s. 6; *Grissett v. Smith*, 61 N. C. 297; *Cates v. Whitfield*, 53 N. C. 266.

⁸¹ Rev. Code, ch. 33, s. 21; C. S. 1417; Rules of Court, 50, 51; *Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801; *Johnston v. R. R.*, 109 N. C. 504, 13 S. E. 381.

⁸² *State v. Ketchy*, 71 N. C. 147; 7 R. C. L. 1015.

⁸³ *State v. Lane*, 26 N. C. 434.

court should, for any reason, be equally divided, the judgment of the lower court will be affirmed, because there is no decision by a majority changing the ruling from which the appeal was taken. This is the decision of the court, effective so far as the particular case is concerned as if there had been unanimous concurrence, but it is not to be considered a precedent to bind the court under the doctrine of *stare decisis*, if the question should again arise.⁸⁴

When the power of the court was statutory, prior to 1868, it was required to "deliver opinions in writing, with the reasons at full length upon which they are founded."⁸⁵ This was intended to prevent *per curiam* decisions, in which the result was declared without any discussion or explanation of the reasons for reaching it. When the written opinions were to be filed, they could be prepared by one justice for the court, but in many cases all the justices filed opinions, even when the decision was unanimous, or the court was equally divided.⁸⁶ When the court was made constitutional, the statutory regulation that the judgments and opinions should be delivered in writing, was continued, but the words "with the reasons at full length upon which they are founded," were omitted. In 1893, the statute was amended, giving the discretion to write the opinions in full in cases in which the court deemed it necessary.⁸⁷ While the statute gives the discretion, it has been held by the court that, without such statute, the discretion existed by reason of the constitutional right to make its own rules of practice.⁸⁸ In a *per curiam* decision or in one affirming the lower court by reason of a divided court, the justices may file opinions expressing their individual views, but these do not constitute the ruling of the court. The same is true in filing concurring or dissenting opinions.⁸⁹ The only case in which the court will not exercise its discretion to write an opinion is when a new trial is granted for newly discovered evidence,

⁸⁴ *Jenkins v. Lumber Co.*, 187 N. C. 864, 123 S. E. 82; *McCarter v. R. R.*, 187 N. C. 863, 123 S. E. 88; *Miller v. Bank*, 176 N. C. 152, 96 S. E. 977; *Ward v. Odell*, 126 N. C. 946, 36 S. E. 194; *Durham v. R. R.*, 113 N. C. 240, 18 S. E. 208.

⁸⁵ Rev. Stats., ch. 33, s. 13; Rev. Code, ch. 33, s. 16.

⁸⁶ *Miller v. Bank*, 176 N. C. 152, 96 S. E. 977; *State v. Ketchy*, 71 N. C. 146.

⁸⁷ C. S. 1416; *Hyder v. Henderson County*, 190 N. C. 664, 130 S. E. 497; *Skipper v. Lumber Co.*, 158 N. C. 322, 74 S. E. 342; *Bradsher v. Cheek*, 112 N. C. 838, 17 S. E. 533.

⁸⁸ Const., Art. 4, s. 12; *State v. Council*, 129 N. C. 511, 39 S. E. 814.

⁸⁹ *Miller v. Bank*, 176 N. C. 152, 96 S. E. 977; *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635, in which there was the leading opinion of the court, and also two concurring and two dissenting opinions.

because this involves only a matter of discretion and not a matter of law.⁹⁰

f. Effect of decision. While the decision of the appellate court is absolutely controlling upon the action of the lower court, it also fixes "the law of the case" in the supreme court. When the supreme court has decided the case and the decision has been certified to the superior court, its jurisdiction over the case is at an end. The "legal link or string" which brought the case up for review is broken, and the case goes "back home" to the superior court, to be there proceeded with in accordance with the decision of the appellate court.⁹¹ When the case has been heard and determined and the term has expired, the jurisdiction is ended, and the case will not be again considered upon a second appeal upon the same question;⁹² nor by a motion to modify the decision;⁹³ nor by a motion to reinstate the case when it has been finally decided;⁹⁴ but when an appeal has been dismissed for failure to comply with some rule of court, or for excusable neglect, it may be reinstated upon proper application.⁹⁵

The court has the power to correct its records, even after the decision has been certified to the superior court, or at a subsequent term, so as to show correctly what was done; as when the entry made was "reversed" when it should have been "affirmed" or "re-manded," and the like.⁹⁶ This correction may be made by the court *ex mero motu*, or upon motion by the party affected, and notice should be given of the correction; but it should appear clearly that

⁹⁰ *Crenshaw v. Street Ry. Co.*, 140 N. C. 192, 52 S. E. 731; *Herndon v. R. R.*, 121 N. C. 498, 28 S. E. 144.

⁹¹ *James v. R. R.*, 123 N. C. 299, 31 S. E. 707; *Davis v. Lumber Co.*, 190 N. C. 873, 130 S. E. 156; *Ray v. Veneer Co.*, 188 N. C. 414, 124 S. E. 756; *R. R. v. Horton*, 176 N. C. 115, 96 S. E. 954; *School Directors v. City of Asheville*, 137 N. C. 503, 50 S. E. 279; *Finlayson v. Kirby*, 127 N. C. 222, 37 S. E. 223; *Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321, and note; *White v. Butcher*, 97 N. C. 8, 2 S. E. 659.

⁹² *Strunks v. R. R.*, 188 N. C. 567, 125 S. E. 182; *Ray v. Veneer Co.*, 188 N. C. 414, 124 S. E. 756; *Holley v. Smith*, 132 N. C. 36, 43 S. E. 501; *Kramer v. R. R.*, 128 N. C. 269, 38 S. E. 372.

⁹³ *Nelson v. Hunter*, 145 N. C. 335, 59 S. E. 116; *Bernhardt v. Brown*, 118 N. C. 700, 710, 24 S. E. 527, 36 L. R. A. 402; *Solomon v. Bates*, 118 N. C. 321, 24 S. E. 746; *Moore v. Hinnant*, 90 N. C. 163.

⁹⁴ *Bowen v. Fox*, 99 N. C. 127, 5 S. E. 437.

⁹⁵ C. S. 600, 1418.

⁹⁶ *Durham v. Cotton Mills*, 144 N. C. 705, 57 S. E. 465, 11 L. R. A. N. S. 1163; *State v. Marsh*, 134 N. C. 184, 47 S. E. 6, 67 L. R. A. 199; *Scroggs v. Stevenson*, 108 N. C. 260, 12 S. E. 1031; *Cook v. Moore*, 100 N. C. 294, 6 S. E. 795, 6 A. S. R. 587.

such mistake was made, since the record imports absolute verity.⁹⁷ Under the former statutory jurisdiction, it was held that the supreme court had no power to issue a writ of error either to the lower court or to correct its own judgments;⁹⁸ nor could a bill of review be filed to correct a decree in this court;⁹⁹ but the statute of 1854 provided that bills of review and writs of error might be brought within two years, in the supreme court, for any error apparent in the final decree or judgment of that court.¹⁰⁰ Such practice does not exist under the present system, and the only remedy to bring the case again before the court is by a petition to rehear. This right existed under the former statute and is now regulated by statute and by rules of court.¹⁰¹

g. *Stare decisis*. Adherence to precedent, *stare decisis et non quieta movere*, is a binding principle of judicial decisions, that when a point has been once settled by judicial determination, it forms a precedent for the guidance of the court in similar cases. This policy is adopted to give certainty, uniformity and stability to the law, and to inspire confidence in the courts that principles of law once fixed will not be readily changed.¹⁰² This is to be distinguished from certain other terms of somewhat similar import. "The law of the case," as explained in discussing the effect of a decision of the court in a particular case, is that the court, having heard the question once, will not again hear the case upon the same point. This is intended to prevent repeated hearings of the same case, and the

⁹⁷ *Summerlin v. Cowles*, 107 N. C. 459, 12 S. E. 234, and cases cited in note 96.

⁹⁸ *Smith v. Cheek*, 50 N. C. 213; *Binford v. Alston*, 15 N. C. 351.

⁹⁹ *Bible Society v. Hollister*, 54 N. C. 10.

¹⁰⁰ Rev. Code, ch. 33, s. 19; *Kincaid v. Conly*, 62 N. C. 270.

¹⁰¹ Rev. Code, ch. 33, s. 18; C. S. 1419; Rules of Court, 52, 53; *Herndon v. Ins. Co.*, 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547. An illustration of the present practice may be found in *Hunter v. Nelson*, 151 N. C. 184, 65 S. E. 909. This case first appears as *Nelson v. Hunter*, 140 N. C. 598, 53 S. E. 439, in which the judgment of the lower court was affirmed; upon a petition to rehear, 144 N. C. 763, 56 S. E. 506, the judgment was again affirmed, a motion was then made in the supreme court to re-examine the record and modify the decision, and this was denied, 145 N. C. 335, 59 S. E. 116; and then a "bill of review" was brought in the superior court to correct error of law in the judgment rendered in the supreme court, and this was not sustained. A proceeding to impeach a decree for fraud may be brought in the superior court, after a judgment rendered in the supreme court. *Farrar v. Staton*, 101 N. C. 78, 7 S. E. 753; *Kincaid v. Conly*, 62 N. C. 270.

¹⁰² 1 Blk. 69; 7 R. C. L. 1000; 15 C. J. 916; 7 Words and Phrases, 1st Series, 6027; 4 Words and Phrases, 2nd Series, 669; *Lowdermilk v. Butler*, 182 N. C. 502, 109 S. E. 571; *Hill v. R. R.*, 143 N. C. 539, 573, 55 S. E. 854, 9 L. R. A. N. S. 606.

ruling of the court may or may not be a precedent for other cases.¹⁰³ *Res judicata* applies to a particular matter in controversy, that when it has once been determined between the parties by a court of competent jurisdiction, it will not be again considered, except upon appeal, in order that there may be an end to litigation.¹⁰⁴ *Stare decisis* refers to a particular principle of law decided, while *res judicata* refers to a particular controversy between the parties. Estoppel grows out of the binding force of a judgment upon the parties thereto, and prevents their denying its effect when rendered by a competent court.¹⁰⁵ The doctrine of estoppel does not operate to prevent a court from overruling a former decision as to a principle of law, if it is thought advisable to do so.

While the application of the rule is general and it will not be departed from unless there is strong reason for doing so, it is not an inflexible rule, and should not be employed to perpetuate error. "Precedents are to be regarded as the great storehouse of experience; not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation."¹⁰⁶ Whether a particular decision will be followed as a precedent "depends upon the character of the decision, that is, whether it is sufficiently definitive and purports to establish a given principle; the nature of the right for which protection is claimed and whether it was considered and reasonably relied upon in the case presented, and how far a sound public policy is involved and must be allowed to affect the question."¹⁰⁷

(a). The court will overrule former decisions when it clearly appears that the law has been improperly declared.¹⁰⁸

(b). In questions of common law or equitable principles, it is usually required that there be a series of decisions, or if one, that it

¹⁰³ *School Directors v. City of Asheville*, 137 N. C. 503, 50 S. E. 279; *Messinger v. Anderson*, 225 U. S. 436, 56 L. Ed. 1152, 32 Sup. Ct. 739; 3 Words and Phrases, 2d Series, 37.

¹⁰⁴ *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228; *White v. Tayloe*, 153 N. C. 29, 68 S. E. 907; *Bear v. Comrs.*, 122 N. C. 434, 29 S. E. 719, 65 A. S. R. 711; 7 Words and Phrases, 1st Series, 6127; 4 Words and Phrases, 2d Series, 298; 15 R. C. L. 949; 34 C. J. 743.

¹⁰⁵ *Coltraine v. Laughlin*, 157 N. C. 282, 72 S. E. 961; *Bear v. Comrs.*, 122 N. C. 434, 29 S. E. 719, 65 A. S. R. 711; *Gay v. Stancill*, 76 N. C. 369; 2 Freeman on Judgments, 1318.

¹⁰⁶ *Spitzer v. Comrs.*, 188 N. C. 30, 123 S. E. 636; *Lowdermilk v. Butler*, 182 N. C. 502, 109 S. E. 571; *Leavitt v. Morrow*, 6 Ohio St. 71.

¹⁰⁷ *Williamson v. Rabon*, 177 N. C. 302, 98 S. E. 830.

¹⁰⁸ *Mial v. Ellington*, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697, overruling *Hoke v. Henderson*, 15 N. C. 1, 25 A. D. 677, which had been recognized as the law for seventy years.

has been generally recognized and accepted. In conflicting decisions, the rule does not operate.¹⁰⁹

(c). While no one has a vested right in a judicial decision, when a single decision or a line of decisions has become the basis of property rights or of contracts, the court will not generally overrule them, although a different conclusion might have been reached originally; and if it should do so, the preexisting rights will be protected.¹¹⁰

(d). When a statute and the decisions are in conflict, the statute will control; but when a construction of a statute has become the basis of property or contract rights, a reversal of the decision will not be retroactive.¹¹¹

(e). A judicial construction of the constitution may be changed by a later decision, where it appears that the proper meaning was not given to the constitutional provision; but vested rights will not be affected.¹¹²

(f). *Dicta*. Expressions used in the opinion of the court which are not necessary to the decision upon the question involved, are called *dicta*. If they are used collaterally or by way of argument or illustration, they are *obiter dicta*; while if used with reference to a question presented but not necessary to the decision, they are *judicial*

¹⁰⁹ *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401; *Williamson v. Rabon*, 177 N. C. 302, 98 S. E. 830, overruling *Fuller v. Jenkins*, 130 N. C. 554, in regard to declaring an absolute deed a mortgage; *Mason v. Cotton Co.*, 148 N. C. 492, 62 S. E. 625, 128 A. S. R. 635, 18 L. R. A. N. S. 1221, overruling *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, in regard to a principle of commercial law in the transfer of draft with bill of lading attached; *Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 A. S. R. 778, overruling *Fox v. Horah*, 36 N. C. 358, 36 A. D. 48, as to the debts of a defunct corporation.

¹¹⁰ *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693; *State v. Bell*, 136 N. C. 674, 49 S. E. 163; *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18, as to the equitable separate estate of a married woman; *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410, 3 L. R. A. N. S. 307, following *Pippen v. Wesson*, 74 N. C. 437, and numerous other cases, in regard to the effect of a married woman's contract, now regulated by the Martin Act, 1911, C. S. 2507; *Stern v. Lee*, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814, as to the effect of the sale of homestead, now regulated by statute, C. S. 729.

¹¹¹ *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401; *Williamson v. Rabon*, 177 N. C. 302, 98 S. E. 830; *Fowle v. Ham*, 176 N. C. 12, 96 S. E. 639; *Hill v. R. R.*, 143 N. C. 539, 569, 55 S. E. 854, 9 L. R. A. N. S. 606; *Grocery Co. v. Bag Co.*, 142 N. C. 174, 55 S. E. 90.

¹¹² *Mason v. Cotton Co.*, 148 N. C. 492, 62 S. E. 625, 128 A. S. R. 635, 18 L. R. A. N. S. 1221; *Collie v. Comrs.*, 145 N. C. 170, 59 S. E. 44, overruling *Barksdale v. Comrs.*, 93 N. C. 472, and *Board of Education v. Comrs.*, 111 N. C. 578, 16 S. E. 621, 18 L. R. A. 570, as to the constitutional limitation of taxation.

dicta. Neither of these will constitute a precedent, but the latter is entitled to greater weight.¹¹³

h. From what courts appeals may be taken. Under the former statute the right of review was limited to cases coming only from the superior court.¹¹⁴ Under the present Constitution, the right of review extends to "any decision of the courts below," and the statute describing the jurisdiction uses the same broad terms;¹¹⁵ but the general regulations of practice in review contemplate appeals coming directly from the superior court, and from inferior courts through the superior court; and in the construction placed upon the Constitution, it has been held that the superior court is the head of the judicial system below the supreme court, and all appeals from inferior courts must come through that court. In *State v. Spurtin*,¹¹⁶ it is said that the words are broad enough to authorize the legislature to provide for appeals from other inferior courts, but it has not done so. In 1895, an inferior court was created for certain counties and the right of appeal was given from that court directly to the supreme court; it was held that the act was unconstitutional, as affecting the jurisdiction of the superior court, and that appeals would lie only from the superior court.¹¹⁷

VII. Supervisory jurisdiction. Under the statutory power prior to 1868, the court was authorized "to issue writs of certiorari, scire facias, habeas corpus, mandamus, and all other writs proper and necessary for the exercise of its jurisdiction and agreeable to the principles of law."¹¹⁸ Except in regard to vacating letters patent, the jurisdiction was entirely appellate, and the writs were issued for the purpose of giving effect to its appellate power.

Under the present system, the jurisdiction is constitutional, and it is authorized "to issue any remedial writs necessary to give it a

¹¹³ *Moose v. Comrs.*, 172 N. C. 419, 433, 90 S. E. 441, Ann. Cas., 1917 E, 1183; *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319; *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18; *Brown v. Chicago and N. W. Ry. Co.*, 102 Wis. 137, 78 N. W. 771, 44 L. R. A. 579; *Newman v. Kay*, 57 W. Va. 98, 49 S. E. 926, 68 L. R. A. 908, 4 Ann. Cas. 39; 15 C. J. 950, 951; 3 Words and Phrases, 1st Series, 2051; 2 Words and Phrases, 2nd Series, 32. *Semble* is the term used with reference to a question which has not been definitely decided, but it is intimated what the decision of the court would be. Bouvier, 3041.

¹¹⁴ Rev. Stats., ch. 33, s. 6; Rev. Code, ch. 33, s. 6.

¹¹⁵ Const., Art. 4, s. 8; C. S. 1411.

¹¹⁶ 80 N. C. 362.

¹¹⁷ *Rhyme v. Lipscombe*, 122 N. C. 650, 29 S. E. 57; *Tate v. Comrs.*, 122 N. C. 661, 29 S. E. 60; *State v. Ray*, 122 N. C. 1097, 29 S. E. 61; *Pate v. R. R.*, 122 N. C. 877, 29 S. E. 334, appeal from railroad commission.

¹¹⁸ Rev. Stats., ch. 33, s. 6; Rev. Code, ch. 33, s. 6.

general supervision and control over the proceedings of the inferior courts."¹¹⁹ This not only gives the power to issue writs to carry into effect the appellate jurisdiction, as it existed before, but makes the supreme court the real head of the judicial system, with power to supervise the inferior courts. The writs which may be used for either of these purposes are not specifically designated, but whatever writs could be used under the ordinary common law practice, may still be used, except as their use may be modified by statute. Some of these writs, as certiorari and supersedeas, are authorized as heretofore in use; the writs of scire facias, mandamus and quo warranto are no longer used as original writs, but are modified by statute; the writ of habeas corpus is also regulated by statute; and the writs of prohibition and procedendo are not mentioned in the statute, but may still be used in proper cases.¹²⁰

The power of the court to issue remedial writs is illustrated in the case of *In re Schenck*.¹²¹ If the court below should refuse to allow an appeal a certiorari would issue; if it refused to carry into effect the order of the appellate court, a mandamus would issue; if it appeared on appeal that a party was unlawfully confined in prison, a writ of habeas corpus would issue. When the court remands a case to the lower court, a writ of procedendo may issue, requiring the court to proceed; but in the general practice the certificate of the decision filed in the lower court is sufficient to require the court to proceed in accordance therewith without further order.¹²² A writ of supersedeas may issue to vacate the order of the lower court;¹²³ and a writ of prohibition may issue only from the supreme court to restrain an inferior court from proceeding in a cause beyond its jurisdiction.¹²⁴

Certain powers of supervision may also be conferred upon a justice of the supreme court, in the nature of original jurisdiction, as in controlling the exercise of power by election officers,¹²⁵ and in

¹¹⁹ Const., Art. 4, s. 8; C. S. 1411.

¹²⁰ Certiorari and supersedeas, C. S. 630; scire facias, mandamus and quo warranto, C. S. 866, 869; habeas corpus, C. S. 2203 et seq.

¹²¹ 74 N. C. 607.

¹²² C. S. 659; *Tussey v. Owens*, 147 N. C. 335, 61 S. E. 180.

¹²³ *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824; *In re Blake*, 184 N. C. 278, 114 S. E. 294; *Page v. Page*, 166 N. C. 90, 80 S. E. 1060; *McArthur v. Timber Co.*, 164 N. C. 383, 80 S. E. 403; *Arey v. Williams*, 154 N. C. 610, 70 S. E. 931.

¹²⁴ *State v. Whitaker*, 114 N. C. 818, 19 S. E. 376; *State v. Superior Court*, 40 Wash. 555, 82 Pac. 877, 111 A. S. R. 925.

¹²⁵ *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132.

issuing writs of habeas corpus.¹²⁶ The justice in such cases is acting as a judge with the power conferred by statute, and not as representing the supreme court.

VIII. Power to make rules. From its first organization the supreme court has made rules to regulate its practice, and it was also authorized to prescribe rules of practice for the superior court. The court, being itself the creature of statute, exercised this power subject to the legislative will.¹²⁷ By the Constitution the court is made an independent branch of the government, and may make its own rules of practice, free from legislative control. In the constitutional power conferred upon the legislature to prescribe rules of practice, this court is expressly excluded; and while the statute still contains such power, it was carried over from the old statute and is not necessary.¹²⁸ The rules of court have been changed from time to time, but many of them are the same as when first prescribed. They are mandatory and not merely directory, and have the force of statutes.¹²⁹

The power to prescribe rules of practice for the superior court and inferior courts is vested in the legislature by the Constitution, and this has been committed to the supreme court by legislative enactment.¹³⁰ The supreme court may prescribe such rules where the legislature has failed to do so, and subject to legislative modification.¹³¹

IX. Power to declare a statute unconstitutional. This power which has given rise to much discussion, and which, since the case of *Marbury v. Madison*,¹³² has become a characteristic principle in the American judicial system, was recognized at an early date in the courts of this state and has been consistently exercised in numerous cases. The declaration in the Bill of Rights and later embodied in the Constitution, that "the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from

¹²⁶ C. S. 2208.

¹²⁷ Rev. Stats., ch. 33, s. 10; Rev. Code, ch. 33, s. 13; *Barnes v. Easton*, 98 N. C. 116, 3 S. E. 744.

¹²⁸ Const., Art. 1, s. 8; Art. 4, s. 12; C. S. 1421; *Lee v. Baird*, 146 N. C. 361, 59 S. E. 876; *Calvert v. Carstarphen*, 133 N. C. 25, 45 S. E. 353; *Herndon v. Ins. Co.*, 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; *Rencher v. Anderson*, 93 N. C. 105.

¹²⁹ *Walker v. Scott*, 102 N. C. 487, 9 S. E. 488; *Horton v. Green*, 104 N. C. 400, 10 S. E. 470, and cases cited in note 128.

¹³⁰ Const., Art. 4, s. 12; C. S. 1421.

¹³¹ *Calvert v. Carstarphen*, 133 N. C. 25, 45 S. E. 353; *State v. Edwards*, 110 N. C. 511, 14 S. E. 741. The rules of court are found in 174 N. C. 827 and 185 N. C. 787.

¹³² 1 Cranch, 137, 2 U. S., L. Ed. 60.

each other," has been held not to interfere with the power of the court to exercise the judicial function to declare the law. In construing the Constitution and statutes, the court is performing a judicial act and not invading the province of legislation, although the result of such construction may render a legislative act void.

The question was first presented in 1787, when the powers of the court were strictly statutory and, therefore, subject to legislative control. In the case of *Bayard v. Singleton*,¹³³ where the question was as to the validity of a statute, it is said, "The court, then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the state, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously," against the validity of the statute. In *State v. Glen*, the court, referring to *Bayard v. Singleton*, says, "Our predecessors were the first of any judges in any state in the Union to assume and exercise the jurisdiction of deciding that a legislative enactment was forbidden by the Constitution, and therefore null and void."¹³⁴ The case which attracted most attention was *Hoke v. Henderson*, in which Chief Justice Ruffin wrote the opinion, holding that there was a property right in a public office and that a statute which interfered with that right was unconstitutional and void. This was recognized as the law in this state for seventy years, until the case was overruled in 1903.¹³⁵

"It is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and, therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the Constitution as against any legislation conflicting therewith, and it has become now an accepted fact in the judicial life of this nation."¹³⁶ In *Railroad v. Cherokee County*, the court declares that "when the constitutionality of an act of the general assembly is questioned, the courts

¹³³ 1 N. C. 5.

¹³⁴ 52 N. C. 321. A similar statement is made in *State v. Moore*, 104 N. C. 714, 10 S. E. 143, 17 A. S. R. 696. About the same time the same action was taken by the courts in New Jersey and Rhode Island.

¹³⁵ 15 N. C. 1, 25 A. D. 677, overruled in *Mial v. Ellington*, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697.

¹³⁶ Iredell, J., in *Calder v. Bull*, 3 U. S. 399, quoted by Connor, J., in *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L. R. A. N. S. 299.

place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people."¹³⁷

¹³⁷ 177 N. C. 86, 97 S. E. 758; see also *State v. Williams*, cited in note 136. The dissenting opinions of Clark, C. J., who strongly questioned the exercise of this power, give the reasons against it and the limitations to be observed.